

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BETHLEHEM CONSTRUCTION, INC., a
Washington corporation,

Plaintiff,

v.

TRANSPORTATION INSURANCE COMPANY,
a foreign corporation,

Defendant.

NO. CV-03-0324-EFS

**ORDER DENYING TRANSPORTATION'S
PUNITIVE DAMAGES MOTION**

Before the Court is Transportation Insurance Company's ("Transportation's") Motion for Partial Summary Judgment on the Non-recoverability of Punitive Damages Against Transportation Insurance Company Under California Law (Ct. Rec. 163). The Court has reviewed the memoranda filed by the parties, listened to the arguments of counsel and now DENIES the motion for the reasons that follow.

I. Applicable Law

In Court Record 530 the Court ruled that California law applied to the issue of the recovery of punitive damages. The pertinent California statute states:

1 (a) In an action for the breach of an obligation not arising
2 from contract, where it is proven by *clear and convincing*
3 evidence that the defendant has been guilty of oppression,
4 fraud, or malice, the plaintiff, in addition to the actual
damages, may recover damages for the sake of example and by way
of punishing the defendant.

5 ...
6 (c) As used in this section, the following definitions shall
7 apply:

8 (1) "Malice" means conduct which is intended by the defendant
9 to cause injury to the plaintiff or *despicable conduct which*
10 *is carried on by the defendant with a willful and conscious*
11 *disregard of the rights or safety of others.*

12 (2) "Oppression" means *despicable conduct that subjects a*
13 *person to cruel and unjust hardship in conscious disregard of*
14 *that person's rights.*

15 (3) "Fraud" means an intentional misrepresentation, deceit, or
16 concealment of a material fact known to the defendant with the
17 intention on the part of the defendant of thereby depriving a
18 person of property or legal rights or otherwise causing injury.

19 Cal. Civ. Code § 3294(a) and (c) (emphasis added).

20 **II. Standard of Review**

21 Summary judgment will be granted if the "pleadings, depositions,
22 answers to interrogatories, and admissions on file, together with the
23 affidavits, if any, show that there is no genuine issue as to any
24 material fact and that the moving party is entitled to judgment as a
25 matter of law." FED. R. CIV. P. 56(c). When considering a motion for
26 summary judgment, a court may not weigh the evidence nor assess
credibility; instead, "the evidence of the non-movant is to be believed,
and all justifiable inferences are to be drawn in his favor." *Anderson*
v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue for
trial exists only if "the evidence is such that a reasonable jury could
return a verdict" for the party opposing summary judgment. *Id.* at 248.
In other words, issues of fact are not material and do not preclude
summary judgment unless they "might affect the outcome of the suit under

1 the governing law." *Id.* There is no genuine issue for trial if the
2 evidence favoring the non-movant is "merely colorable" or "not
3 significantly probative." *Id.* at 249.

4 If the party requesting summary judgment demonstrates the absence
5 of a genuine material fact, the party opposing summary judgment "may not
6 rest upon the mere allegations or denials of his pleading, but . . . must
7 set forth specific facts showing that there is a genuine issue for trial"
8 or judgment may be granted as a matter of law. *Anderson*, 477 U.S. at 248.
9 This requires the party opposing summary judgment to present or identify
10 in the record evidence sufficient to establish the existence of any
11 challenged element that is essential to that party's case and for which
12 that party will bear the burden of proof at trial. *Celotex Corp. v.*
13 *Catrett*, 477 U.S. 317, 322-23 (1986). Failure to contradict the moving
14 party's facts with counter affidavits or other responsive materials may
15 result in the entry of summary judgment if the party requesting summary
16 judgment is otherwise entitled to judgment as a matter of law. *Anderson*
17 *v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

18 **III. Analysis and Conclusion**

19 In support of its motion, Transportation argues that there were no
20 facts demonstrating clear and convincing evidence of Transportation's
21 conduct meeting the statutory standard for punitive damages either in
22 Bethlehem Construction Inc.'s ("Bethlehem's") answers to specific
23 interrogatories requesting that information or in the Federal Rule of
24 Civil Procedure 26(a)(2)(B) report of Mr. Casselman, Bethlehem's expert
25 on this issue, or in his deposition quoting the pertinent answers and
26 attaching documents. In response, Bethlehem submitted declarations and

1 attachments in an effort to carry its *Celotex* burden. The Court has
2 carefully reviewed the material submitted by both parties. Viewing
3 factual material and the reasonable inferences therefrom in a light most
4 favorable to Bethlehem, the Court concludes that Bethlehem has met its
5 *Celotex* burden and that there is a genuine issue of material fact as to
6 whether the conduct of Transportation meets the California statutory
7 standard for an award of punitive damages.

8 The Court notes that Bethlehem's interrogatory answers were
9 awkwardly phrased and by themselves may not have been enough to meet the
10 *Celotex* burden. However, Mr. Casselman's Rule 26(a)(2)(B) report and his
11 deposition testimony pointedly discussed the conduct of Transportation
12 from which a jury could conclude that there was clear and convincing
13 evidence it acted in conscious disregard of the rights of Bethlehem under
14 the insurance policies in effect. Together with the declaration of Mr.
15 Addleman, who interacted with Transportation representatives and lawyers
16 for Steveco, and the declaration of Mr. McCormick, a percipient witness
17 to discussions with both Transportation representatives and the lawyers
18 for Steveco and the attachments thereto, the Court concludes that there
19 are genuine issues of material fact which require the denial of this
20 motion.

21 As to Transportation's shotgun evidentiary objections to Bethlehem's
22 declarations and attachments thereto in Transportation's reply, they are
23 overruled.

24 Accordingly, **IT IS HEREBY ORDERED:** Transportation's Motion for
25 Partial Summary Judgment on the Non-recoverability of Punitive Damages
26 Against Transportation Under California Law (**Ct. Rec. 163**) is **DENIED**.

DATED this 9th day of March 2007.

ORDER ~ 5